INDEX.

		PAGE
1.	Statement of facts	3
2.	This court has no jurisdiction to review judgment	4
3.	Riparian ownership is controlled by each state by its sovereign authority	5
4.	Public right of fishery exists independent of the ownership of the land	6
5.	Rule as to fishing in England	10
6.	Rule adopted in the American Colonies and in the United States	11
7.	Public right of fishery at Common Law	12
8.	Common Law rule adopted in Ohio	13
9.	Waters in dispute are a public navigable bay	13
10.	A river defined	14
11.	A watercourse defined	15
12.	A bay defined	15
13.	An arm of the sea defined	15
14.	An estuary defined	16
15.	Waters in dispute are navigable	16
16.	Waters navigable in fact are navigable in law	17
17.	Fishing is commerce	18
18.	Ordinance of 1787	20
19.	The state holds title to bed of navigable waters upon a public trust for navigation and fishing	20
20.	Plaintiff in error does not own the fish	22
21.	Waters were not sold as river and creek but as a part of Sandusky Bay	22
22.	Conclusion	24

14231

In the Supreme Court of the United States.

No. 153.

THE WINOUS POINT SHOOTING CLUB,
Plaintiff in Error,

vs.

JEPPE CASPERSEN, PETER PETERSEN,
WILLIAM DECKER and
CHARLES PETERSEN,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

I.

STATEMENT OF FACTS.

The Circuit Court in the case of Bodi vs. The Winous Point Shooting Club, 20 O. C. C. 637., held that the territory in dispute was a part of Sandusky River and Mud Creek and enjoined Bodi from fishing and hunting thereon, upon the theory that the Shooting Club owned the lands by riparian ownership. Bodi prosecuted error to the Supreme Court of Ohio upon the findings of fact made by the Circuit Court without a bill of exceptions containing the evidence. The Supreme Court reversed the Circuit Court as to the public right of fishing holding that the waters in dispute were a part of a public bay and not parts of the Sandusky River and Mud Creek.

The court did not disturb the finding as to hunting because the finding of fact set out that the Sporting Club owned the lands under the water.

But the findings did not show that it was by virtue or riparian ownership.

The Circuit Court in this case followed the Supreme Court in the Bodi case and held that the waters in dispute were a

navigable public bay and that the Sporting Club did not own the lands under such waters, and that the public right of fishery existed therein. The Supreme Court of Ohio affirmed that judgment upon both the facts and the law.

2.

THIS COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE STATE COURT.

To give this court jurisdiction of a writ of error to the state court it must appear affirmatively, not only that a federal question was presented for decision of the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

County of Cook v. Calumet and Chicago Canal and Dock Co. 138 U. S. 635-637.
Detroit City R. R. Co. v. Guthard 114 U. S. 133.
De Saussure v. Gaillard 127 U. S. 216.
Kansas Endowment and Benev. Asso. v. Kansas 120 U. S. 103.
Church v. Kelsie 121 U. S. 282.
McDonough v. Millander 44 U. S. (3 How.) 693.

This court will not entertain jurisdiction of state judgments where, beside the federal question decided by the state court there is another and distinct ground upon which the judgment can be sustained.

Kennebec and P. R. Co. v. Portland and K. R. Co. 81 U. S. 14 Wall. 23 (20:850)
Rector v. Ashley 73 U. S. 6 Wall. 142 (18:733)
Gibson v. Chouteau 75 U. S. 8 Wall. 314 (19:317)
Klinger v. Missouri 80 U. S. 13 Wall. 257 (20:635)
Moore v. Mississippi 88 U. S. 21.

Alleged errors of a state court which involves questions either of fact or of state and not federal law are not reviewable in the United States Supreme Court on writ of error.

Quimby v. Boyd. 128 U. S. 488.

A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgment of state courts. The bare averment of a Federal question is not sufficient. There must be at least color of ground for such averment.

Hamblin v. Western Land Co. 147 U. S. 530.

In the findings of fact of the circuit court, the court found that the plaintiff club were in the "actual possession of so much of the lands, marshes and shores described in the petition (Ex-

cept Section 35) as described and comprised in the sections and fractional sections described in the survey and map made by Sylvanus Bourne." (Record, p. 28.)

The court finds that the plaintiff club was not in possession and did not own the lands covered by the waters of Mud Creek Bay. The state circuit court further found that much of said property so surveyed in said fractional sections aforesaid is now submerged and over-flowed land, and much was marsh land at the time of said survey, and was acquired from the State of Ohio, directly or indirectly through plaintiff's grantors and predecessors in title under what is known as the "Swamp Land Acts." The other lands, i. e. those not granted by the state as swamp lands, were patented by the government to the plaintiff's predecessors in title. "(Rec. pp. 29-30.) The court will observe that the territory in dispute in this case is not embraced within the sections and fractional sections mentioned in said findings of fact, but all the waters in dispute in this case lie beyond the shore line of said sections and fractional sections. (Rec. p. 35.)

The finding of the circuit court as to swamp lands in the fractional sections being acquired from the State of Ohio is sustained by the record but the finding that the other lands were patented by the government to the plaintiff's predecessors in title is not sustained by the record and is an erroneous finding, there being no patents from the government nor anything equivalet thereto shown by the record. The plaintiff in error cannot take advantage of an erroneous finding in its favor. The findings of fact are more favorable to the plaintiff in error than the facts in the record warrant.

"The state has full power of disposition of the swamp lands granted to it and the application of the proceeds to the purposes of the grants rests upon the good faith of the state which might exercise its discretion as to its disposal.",

County of Cook v. Calumet and Chicago Canal and Dock Co., 138 U. S. 635-655.

3.

THE QUESTION AS TO WHETHER OR NOT RIPARIAN OWNERSHIP WILL BE PERMITTED AND THE EXTENT OF SUCH OWNERSHIP PROPERLY BELONGS TO THE STATES BY THEIR INHERENT SOVEREIGNTY.

"Grants of the government for lands bordering on tide waters extends only to high water mark, the title to the shore and lands under water in front of lands so granted insures to the state within which they are situated.

"Grants of the government for lands bounded on streams or other waters without any reservation or restriction of terms are to be considered as to their effect according to the law of the state in which the lands lie."

Hardin v. Jordan, 140 U. S., 371-406.

"Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state——a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery——and cannot be retained or granted out to individuals by the United States."

Hardin v. Jordan 140 U. S., 371-406.
Pollard v. Hagan 44 U. S., 3 How. 212 (11:565.)
Goodtitle v. Gibbe, 50 U. S., 9 How. 471 (13:220.)
Weber v. Board of Harbor Comrs. 85 U. S., 18 Wall. 57 (21:798.)

"The state may even dispose of the usufruct of such lands as is frequently done by leasing oyster beds in them and granting fisheries in particular localities; also by the reclamation of submerged flats, etc."

Hardin v. Jordan 140 U. S., 371-406.
Manchester v. Massachusetts 139 U. S., 240 (35:159.)
McCready v. Virginia 94 U. S., 391 (24:248.)
Martin v. Waddell 41 U. S., 16 Pet. 367 (10:997.)

And the state may refuse to do so and hold the right of fishing to be public and this court has no jurisdiction to review such a judgment.

4.

THE PUBLIC RIGHT OF FISHERY IN THE WATERS IN DISPUTE IN THIS CASE EXISTS IRRESPECTIVE OF THE OWNERSHIP OF THE SOIL.

The supreme court of Ohio in this case affirmed the judgment of the circuit court on the authority of

Bodi v. Winous Point Shooting Club 57 O. S. 226.

And in the case of Bodi, et al. v. Winous Point Shooting Club, 57 O. S., 226, the court held that the public has the right of navigation and fishing in the navigable waters of the open bays of Lake Erie in this state Sloan v. Biemiller, 34 O. S., 492, followed and approved. In Sloan v. Biemiller, supra, the court held "that fishery in such waters as Lake Erie and its bays should be as free and common as upon tide waters and alike subject to the control by public authority is obviously just. The reasons for regarding the right as public is as great in one case as in the other; and we have no hesitation in saying that the right of fishing in these waters is as open to the public as if they were subject to the ebb and flow of the tide," and on page 513 the court, quoting Angell on Tide-waters, say, "Fishery in

the sea and in the waters which are made to flow inland therefrom by its egress and influence, consisting as it does, a great source of sustentation, has in all ages and in all countries been deemed of such importance that it has ever been regarded a privilege open and common to all persons.

The same rule is laid down in Hogg v. Beerman, 41 O. S. 81., and The East Harbor Sportsmans Club v. Kelting, 37 W. L. B., 259 56 O. S., 746.

It will thus be seen that the Supreme Court of Ohio applies the doctrine of Sloan v. Biemiller, 34 O. S., 492 to all the waters in dispute, and as such waters rise and fall with Lake Erie, any further inquiry into their character is immaterial.

Justice Field, in delivering a very learned and exhaustive opinion in the case of Ill. C. R. Co., v. Ill., 146 U. S., 387, 36 L. Ed. 1018, stated the law to be: "The Great Lakes are not, in any appreciable respect, affected by the tides, and yet on their waters*****a large commerce is carried on, exceeding in many instances, the entire commerce of States on the borders of the sea.

When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So, also, by the common law, the doctrine of the dominion over and ownership by the crown, of lands, within the realms under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, "tide-waters" and "navigable waters"*****being used as synonomous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use, so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public, the use of navigable waters from private interruption and encroachment. A reason as applicable to navigable fresh waters as to the waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over, and ownership of the lands under navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over the ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other and subject to the same trusts and limitations."

The Supreme Court of Michigan in the case of People v. Silverwood, decided in 1896, 32 L. R. A., 694, after quoting the above language of Justice Field, say "That the reasoning of the case is without flaw and that the law enunciated ought to stand as the law of this State. It commends itself to one's reason and

judgment and avoids many difficulties incident to a different construction of the law. The doctrine too, is in harmony with all decisions of the States bordering on these Great Seas.".

Justice Field also says in the same case (146 U. S., 387,) "that it is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties."

In McLennan v. Prentis, 85 Wis., 444, the territory in question was a lot or parcel of land lying beneath a shoal bay connected with Lake Michigan. The court held that "lands lying under shoal waters of the Great Lakes and between the banks and navigable waters, are held by the State in trust for the public purposes of navigation and fishing."

"The rights which the State holds in these lands is in virtue of its sovereignty and in trust for the public purposes of navigation and fishing."

The American and English Encyclopedia of Law, Vol. 4, 2nd. Ed., beginning on page 823, under the subject of "Boundaries," gives a very full and complete summary of authorities upon the question of riparian ownership in the United States.

"There is no uniformity of decision in the courts throughout the United States. In some cases the courts have carried the boundary of lands abutting on navigable rivers to the "Medium Filum Aquae." American and English Encyclopedia of Law, Vol. 4, p. 823. See Sloan v. Biemiller, 34 O. S., 511.

The principle has sometimes been laid down that deeds conveying lands bordering upon fresh water navigable rivers are presumed to extend the boundaries only to the bank or ordinary "high water mark thereof." American and English Encyclopedia of Law, Vol. 4, pp. 824 and 825. See the cases cited in United States, California, Arkansas, Iowa, Kansas, Missouri, Oregon and Vermont, on pages 825 and 826.

"There are many cases which hold that the boundary of lands abutting on fresh water navigable rivers in the United States, extends to low water mark." Supra, p. 826. Citing a great number of cases in Indiana, Minnesota, New Jersey, Pennsylvania, Tennessee, Virginia and West Virginia.

Summary of authorities as to proper rule applicable to navigable rivers.,

"There has been little attempe made in this country, except in a few cases, to maintain or enforce any uniform principle in regard to the ownership of the soil of navigable rivers or the boundaries of lands abutting upon them. The trouble has arisen from the application of the common-law definition of a navigable river, and the result is the conflict of authority and confusion which prevails now. What seems to be the soundest law is set out below." American and English Encyclopedia of Law, Vol. 4, p. 827.

"The 9th section of the Judiciary Act, 1789, by which the first court of admiralty was established, declares that the district courts shall have exclusive cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas."

This Act of Congress is quoted by Taney, C. J., in his judgment in The Propeller Genesee Chief v. Fitzhugh, 12 How. (U. S.) 457, and is made the basis of that judgment. Following these are the decisions of the United States Supreme Court in the cases of the St. Paul, etc., R. Co. v. Shurmeir, 7 Wall. (U. S.) 272 and in Barney v. Keokuk, 94 U. S. 324, in which the latter court, by Bradley, J. said: "The confusion of navigable with tide-water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Islands and that of the American Continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and under the like influence it laid the foundation in many states, of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether as rules of property it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin v. Waddell, 16 Pet. (U. S.) 367: Pollard v. Hagan 3 How. (U. S.) 212; and Goodtitle v. Gibbe, 9 How. (U. S.) 471.

These cases relate to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of The Propeller Genessee Chief v. Fitzhugh, 12 How. (U. S.) 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters.

It properly belongs to the states by their inherent sovereignty; and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.

The cases in which the court has seemed to hold a contrary view depended, as most cases must depend, on the local laws

of the states in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject. The exhaustive examination of this question by the Supreme Court of Iowa, in 1856, in the case of McManusy v. Carmichael, 3 Iowa 1, really leaves nothing to be said. The precise point was directly before the court——namely, whether the title of the riparian proprietor extends below high water, in the Mississippi River; and is was decided that it does not. This decision has been followed by subsequent cases, especially the case of Haight v. Keokuk, 4 Iowa, 199, and Tomlin v. Dubuque, etc. R. Co., 32 Iowa, 106, 7 Am. Rep. 176

The above enactment and the judgments here given, although they conflict with the ruling of the Supreme Court of the United States in the case of Jones v. Soulard, 24 How. (U. S.) 41, and with a whole host of local cases which adopt the common law rule of the "filum aquae" even in the case of the great rivers, established what seems to be the true principle of American law in regard to the proprietorship of the soil in the beds of fresh water navigable rivers in the United States, and the boundary of land owners abutting upon them; that is, that the soil of the fresh water navigable rivers belongs to the states which border on them below high water mark, by virtue of their inherent right of sovereignty, and that the boundary of the riparian owners is properly limited by the same line. Whenever there is any departure from this rule it is sporadic and local; and, speaking broadly, it is founded neither in good sense nor in sound law. This doctrine in regard to the boundary of lands abutting on the fresh water navigable rivers of this country is directly subversive of the rule of the common law of England in regard to the "filum aquae" which in reason and nature is not applicable to the conditions in the United States."

4 Am. and Eng. Encyc. of Law, 2nd. Ed., p. 827.

5.

RULE IN ENGLAND AS TO FISHING IN NAVIGABLE WATERS.

In England the soil of navigable tidal waters within the territorial limits of the State, as far as the tide flows and reflows, is "prima facie," in the Crown, and the right of fishing is, prima facie," in the public.

Hale, De Jure Maris, C. 4.
Malcolmson v. O'Dea, 10 H. L. Cas., 593.
Smith v. Andrews, (1891) 2 Ch. 678.
Blount v. Layard, (1891) 2 Ch. 681, note 3.
Peace v. Scotcher, 9 Q. B. div. 162.

Blower v. Ellis, 50 J. P., 326.
Reg. v. Stimpson, 4 B. and S., 301, 116, E. C. L. 301.
Carlisle v. Graham, L. R. 4 Exch. 361.
Blundell v. Catterall, 5 B. and Ald. 304, 7 E. C. L. 108.
Oxford v. Richardson, 4 T. R. 437.
Carter v. Murcot, 4 Burr, 2162.
Richardson v. Oxford, 2 H. Bl. 182. 1 Anstr. 231.
Ward v. Creswell, Willes 265.
Warren v. Mathews, 6 Mod. 73. 1 Salk 357.
Fitzwalter's Case, 1 Mod. 105.
Royal Fishery of the Banne, Davies Rep. 149.
Crichton v. Collery, 19 W. R. 107.
Murphy v. Ryan, 2 Ir. C. L. Rep. 143.
13 Am. and Eng. Encyc. of Law, 2nd. Ed., p. 560.

Before Magna Charta the Crown could grant the exclusive right of fishery in tidal waters to a private individual either together with or distinct from the soil. Magna Charta prohibited for the future, the grants of exclusive fisheries in tidal waters.

13 Am. and Eng. Encyc. Law, Vol. 4. p. 561.
2 Black Com. 39, 417.
4 Black. Com. 424.
Gann v. Free Fishers, 11 H. L. Cas. 209.

6.

RULE ADOPTED IN THE AMERICAN COLONIES AND IN THE UNITED STATES.

The charters granted by the Crown of England to individuals for the purpose of enabling them to plant colonies on the North American Continent, are construed according to the common law of England and it was held that the lands under the navigable waters within the territories included in such charters were held by the grantees, as the soil under navigable waters of England is held by the Crown, subject to the public right of fishing.

After the Revolution took place, the people of each State became themselves Sovereign and held absolute right to all navigable waters within their territorial limits including the fisheries in such waters.

13 Am. and Eng. Encyc. of Law, 2nd. Ed., p. 562.
Arnold v. Mundy, 6 N. J. L., 1, 10 Am. Dec. 356.
Martin v. Waddell, 16 Pet. (U. S.) 367.
Den v. Jersey Co., 15 How. U. S., 246.
Church v. Meeker, 34. Conn. 421.
Moulton v. Libby, 37 Me. 472, 59, Am. Dec., 57.
Com. v. Roxbury, 9 Gray (Mass.) 451.
Weston v. Simpson, 8 Cush. (Mass.) 347.

Wooley v. Campbell, 37 N. J. L., 163.
Tinicum Fishing Co. v. Carter, 61 Pa. St., 21, 100 Am. Dec. 597.

The court say in Arnold v. Mundy, 6 N. J. L., p. 90, after reviewing the English authorities on the right of the public to fish, that, "on comparing all of the above authorities and the reasons on which they are founded, we are compelled to acknowledge that although the Kings of England formerly may have lavished on favorites or rewarded the services of individuals with any franchises entrusted to them for the public benefit, yet, the people ever considered it a violation of good faith, an unlawful infringement on their common rights, and as destructive alike to their liberties and their interests until the evil increasing beyond endurance they, sword in hand, forced from their king, the most solemn and public declaration of their rights in Magna Charta."

In Parker v. People, 111 Ill., 590, the court say: "There are some things that are incapable of individual ownership, such as air and water. All may and do participate, without restraint, in their enjoyment. They are the common inheritance of mankind. There are other things, to a large extent incapable of individual ownership, and these are game and fish; they belong to all equally*********

The public right of fishing in the navigable waters in the United States resides in the people of the State.

Martin v. Waddell, 16 Pet. (U. S.) 367.
Manchester v. Massachusetts, 139 U. S., 240.
Affirming, 152 Mass. 230.
Schibely v. Bowlby, 152 U. S. 1.
Lay v. King, 5 Day (Conn.) 72.
Procter v. Wells, 103 Mass. 216.
Lincoln v. Davis, 53 Mich. 375.
State v. Roberts, 59 N. H., 256.
Arnold v. Mundy, 6 N. J. L., 1.
Polhemus v. Bateman, 60 N. J. L., 163.
Am. and Eng. Encyc. of Law, Vol. 13, 2nd. Ed., p. 563, note 1.

7.

PUBLIC RIGHT OF FISHING AT COMMON LAW.

It will thus be seen that there is no doubt that by common law, all persons have a common and general right of fishing in the sea and in the waters which are made to flow inland therefrom by its egress and influence, as its bays, estuaries, inlets coves, branches, arms of the sea and in all other navigable or tide waters.

13

Ill. Central R. R. Co., v. People, 146, U. S., 387.
McCready v. Virginia, 94 U. S., 391.
Chalker v. Dickenson, 1 Conn., 382.
Adams v. Pease, 2 Conn., 481.
Mathews v. Treat, 75 Me., 595.
Sollers v. Sollers, 77 Md., 148.
Angell on Tide Waters, Sec. 65.
Woolrych on Waters, Sec. 129.
Peck v. Lockwood, 5 Day, Conn., 22.
Sterling v. Jackson, 69 Mich. 518.
Mathew v. Chapman, 40 Conn., 399.

8.

COMMON LAW RULE ADOPTED IN OHIO

Sloan v. Biemiller, 34 O. S. 492.
Bodi, et al., v. The Winous Point Shooting Club, 57 O. S. 226.
Hogg v. Beerman, 41 O. S. 81.
East Harbor Sportsmans Club v. Kelting et al., 37 W. L. S., 259, 56 O. S., 746.

And we contend that this public right of fishery exists in these waters whether they be river or bay, according to the law of Ohio which is conclusive.

9.

WATERS IN DISPUTE IN THIS CASE ARE A PUBLIC NAVIGABLE BAY CONNECTED WITH LAKE ERIE AND ARE NOT PARTS OF THE SANDUSKY RIVER AND MUD CREEK.

All the waters in dispute in this case, which are those waters lying west of a line drawn from Slade's Point to a point at the east end of Eagle Island and thence to South Point, and between Squaw Island on the south, Horseshoe Island on the west and the shore line of the bay on the north, and lying between the shores, aforesaid, form part of a public bay and are not parts of the Sandusky River and Mud Creek; and being parts of an open bay, and navigable, as aforesaid, the defendants, as members of the public, have the right of navigation and fishing in said waters. 45)

This is the second conclusion of law of the Circuit Court in this case and we claim it to be a correct statement of the law; and under the evidence of the case there are none of the elements of a river in the territory in dispute.

10.

DEFINITION OF A RIVER.

Houck says, in his work on rivers, Section 1, page 1:

"Lexicographers have defined a river to be "a large stream of water flowing in a channel on land toward the ocean, a lake; or another river."

The word is derived from the old French word "riviere" meaning a bank, a shore, or rather a country on the banks of a river.

Webster's Dict. "River."

American Encyclopedia, "River."

In legal language, a river has been defined by Wollrych to be "a running stream, pent in on either side with walls and banks."

Houck on Rivers, Sec. 2, page 1.

Every river consists of water, bed and banks.

Gavitt v. Chambers, 3 Ohio, 498.

Gould on Waters, Sec. 41, says " a river is a running stream of water pent in on either side by banks, shores or walls." Every river consists of (1) banks, (2) the bed, (3) the water."

Angell on Watercourses, Sec. 3 and 4 and notes.

Gavitt v. Chambers, 3 Ohio, 498.

Justice Curtis says, in Howard v. Ingersoll, 13 How. 426, "the banks of a river are those elevations of land which confine the water when they rise out of the bed."

McCullough v. Wainwright, 14 Penn. St., 171.

A river is said to be pent in by walls or banks and is thus contra-distinguished from a sea or a bay which encompasses the land, rather than is encompassed by it.

A bank is defined to be a steep declivity rising from a river, lake or sea.

Webster Def. "Bank."

Bouvier says: "Banks of rivers contain the river in its natural channel when there is the greatest flow of water."

Bouvier Law Dict.

Mr. Justice Story defines shores or flats to be the space between the margin of the river in a low stage and the banks which contain it in its greatest flow, thus distinguishing flats or shores from banks.

Thomas v. Hatch, 3 Summ., 178.

Chief Justice Marshall says: "The shores of a river border on the water's edge."

Handley's Lessee v. Anthony, 5 Wheat., 374, 385.

"If the shore borders on the edge of the water, it must extend outwards to the bank and, therefore, cannot be the bank which, in certain stages of the river, it separates from the water's edge."

15

A river, then consists of water, a bed, and banks; these several parts constituting a river, the whole river. It is a compound idea; it cannot exist without all of its parts.

11.

WATERCOURSE DEFINED.

A watercourse is defined, in Vol. 28, Am. and Eng. Encyc. of Law, on page 944, as "A stream of water usually flowing in a definite channel having a bed and sides, or banks, and discharging itself into some other stream or body of water." There must be, ordinarily, a moving body of water.

In Jeffers v. Jeffers, 107 N. Y. 651, a watercourse is defined as "a living stream with defined banks and channels."

Joliet, etc. R. R. Co. v, Healy, 94 Ill., 416.

Gillett v. Johnson, 30 Conn. 180.

"The bank of a stream is the continuous margin where vegetation ceases." 2 Harris, 171. This means land vegetation, not aquatic grasses which grow during but few months of the year and which will grow in six feet of water (58.)

12.

A BAY DEFINED.

In Vol. 3, Am. and Eng. Encyc. of Law, 2nd. Ed., page 899: "A bay is defined as opening into the land where the water is shut in on all sides except at the entrance." Applying this definition to the waters in dispute, the court will have no trouble, by the aid of the maps and other evidence, in disposing of this case the same as the Supreme Court of Ohio. In State v. Gillman, 14 N. H., 477, in determining the question whether a particular body of water was or was not a river, the court say, "this question cannot be determined by ascertaining what appellations have been given to it. The name cannot alter the thing; it cannot be received as a proper definition of the character of the water."

13.

ARM OF THE SEA DEFINED.

The court say, in Attorney-General v. Delaware, etc. R. R. Co., N. J. Eq. 635. "A bay is an arm of the sea distinct from a river." "An arm of the sea is a portion of the sea projecting inland, in which the tide ebbs and flows: it included bays, roads, creeks, coves, ports and rivers where the water flows and reflows."

An arm of the sea is considered as extending as far into the interior of a country as the waters of fresh rivers are propelled backward by the egress and pressure of the tide.

Bouvier's Law Dict. Def. Arm of the Sea.
Angell, Tide Waters, 2nd. Ed., 73.
7 Peters, 324.

In Johnson v. State, 47 Ala. 538, the court say: "There is a well recognized distinction between a river and a bay, the one being an inland stream and the other an inlet of the sea. Where the one begins and the other ends may often be a question of difficulty, yet, the two are legally and, in fact, essentially distinct."

Applying the above definitions to the waters in dispute in this case, the court will have no difficulty in finding that they constitute a bay.

14.

AN ESTUARY DEFINED.

This brings us to the question. What is an estuary?

Webster defines an estuary as "a narrow passage as the mouth of a river or lake where the tide meets the current: an arm of the sea."

The Century Dict. defines an estuary as "a channel extending from the sea; an arm or inlet of the sea; that part of the mouth or lower course of a river flowing into the sea which is subject to tides; specifically, an enlargement of a river or channel at its mouth in which the movement of the tides is very prominent."

The Supreme Court in Sloan v. Biemiller, 34 O. S., 513, applies the common law rule of fishing in bays and estuaries and say, "fishery in the sea and the waters which are made to flow inland therefrom by its egress and influence, constituting, as it does, a great source of sustentation, has in all ages and in all countries, been deemed of such importance that it has ever been regarded a privilege open and common to all persons."

That the waters in all of this territory rise and fall with the waters of Lake Erie; that the waters are made to flow inland by the egress and influence of the waters of the lake caused by the winds, is undisputed by the facts in this case.

15.

THE WATERS IN DISPUTE ARE NAVIGABLE.

The waters in dispute in this case are navigable for ordinary water craft and have been so used continuously for fifty years. (40) (56) (41) (45.) Scows sixty or seventy feet long and eigh-

teen to twenty feet beam, drawing from sixteen inches to three and one-half feet (284-289) have sailed over nearly all of Mud Creek Bay during all seasons of the year when there was no ice (285) and have "tacked" across Mud Creek Bay loaded with wood, cord wood, hickory butts, etc., (269-284-289 and 290) and sailed within twenty-five or thirty rods from the shore at an ordinary stage of the water (285-295.) There were both steam boats and sail scows (286-290-269.) The steamer "Dessault" hauled stone for the riprapping along the shores of the bay and sailed within twenty-five or thirty rods of the shore, and the stone were loaded on a lighter and unloaded on the shore (269.) Fishing boats of various sizes sail over all parts of the bay from shore to shore (269-284-290-295.) The undisputed depths of water throughout Mud Bay show that it is navigable.

16.

WATERS WHICH ARE NAVIGABLE IN FACT ARE NAVIGABLE IN LAW.

Waters which are navigable in fact are navigable in law.

Bernard v. Keokuk, 84 U. S., 324.
Hickok v. Hine, 23 O. S., 523.
Sloan v. Biemiller, 34 O. S., 511.

Not only have the waters of the bay in dispute always been used for purposes of navigation, but they are capable of use by the public for transportation and commerce.

The navigability of waters is not so much to be determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce.

Hickok v. Hine 23 O. S., 523-527.

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of the river rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes, in law, a public highway.

Monticello, 20 Wall. (U. S.) 430-441-2.
Carter v. Thurston, 58 N. H., 104.
Diedrich v. Northwestern R. Co., 42 Wis., 248.
Broadway v. Baker, 94 N. Car. 675-681, s. c. 55 Am. Rep. 633.
Attorney General v. Woods, 108 Mass., 436.
Toledo Liberal Shooting Club v. Erie Shooting Club 90 Fed., 680.

In this case Judge Lurton says, "It is the capability of be-

ing navigated for useful purposes which is the test."

Packer v. Bird, 137 U. S., 661.
Jeremy v. Elwell, 5 C. C. Rep., 383.
Trout and Salmon Club v. Mather, 68 Vt., 338.

17.

FISHING IS COMMERCE, NAVIGATION IS THE MEANS BY WHICH IT IS CONDUCTED, AND NAVIGATION AND FISHING GO TOGETHER IN THESE WATERS.

Fishing in Lake Erie and its tributary waters, is commerce, and is conducted by means of navigation. The supreme Court of Ohio say, in Pollock v. The Cleveland Ship Building Co., 56 O. S., 668, "Clearly the term "easement of navigation" should not be construed in any narrow, scientific sense, but, having in mind the reservation of the easement by the state is for the benefit of the public in its use of the highway, should receive a construction in harmony with the nature of the uses of the water by the public, and the objects of a public nature, to be accomplished by such uses, etc."

Fishing is commerce and is carried on by means of boats, and navigation is the means by which it is conducted.

According to bulletin No. 16, issued by the United States Commission of Fish and Fisheries, for the year 1899, showing the magnitude of the fisheries of Lake Erie for the year 1899, there were four thousand men employed and an investment in fisheries of $2,719,654. That in Ohio, alone, there were more than two thousand men employed in fishing in Lake Erie and its tributary waters and an investment of $1,871,622.

There were fifty fishing steamers, sixteen transporting steamers, and 630 boats used in such commercial fishing in Ohio of the value of $308,497.00 and 48 pile drivers of the value of $22,705.00 and the catch in Ohio, alone, during the season amounted to 30,624,400 pounds of the value of $677,305.

In Lincoln v. Davis, 53 Mich. 375, Mr. Justice Campbell says, "Such fishing as is done with lines from boats in narrow streams cannot be complained of by riparian owners."

"The fish are like any other animal, ferae naturae, and in this region, have always been regarded as open to capture by those having a right to be where they are captured."

Judge Campbell says, in Sterling v. Jackson, 69 Mich., 518, "There was never any principal or practice which confined rights of travel on highways by land or by water to commercial purposes. Boats and vehicles are as lawfully used for pleasure and recreation as for any other purposes.

Both in England and in the United States, the fisheries are

always brought under the navigation laws."

In the most approved modern sense of the term in this country, navigable waters include all those which afford a channel for use for commerce.

Such waters are public highways of common right.

Am. and Eng. Encyc. of Law, Vol. 16, 236, and the several cases there cited.

But such commerce need not be conducted by means of boats and vessels waters which are capable only of floating rafts and logs are public highways for that purpose.

Am. and Eng. Encyc. of Law, Vol. 16, 242, and the many cases there cited.

It is not necessary for such waters to be fit for navigation at all times, but their capacity therefor must occur with regularity.

Walker v. Allen, 72 Ala., 456.
Thunder Bay River Booming Co. v. Speechly, 31. Mich., 336
Hogg v. Zanesville, etc. Canal Co., 5 Ohio, 410.
Olsen v. Merrill, 42 Wis., 203-212.
Holden v. Robinson Mfg. Co., 65 Me., 216.
Treat v. Lord, Me., 552.
Fulmer v. Williams, 122 Penn. St., 191.
Lancey v. Clifford, 54 Me., 489.

"He has no property in the water itself, but a simple usufruct."

Weiss v. O. I. & S. Co., 13 Ore., 496.
Scranton v. Wheeler, 57 Fed., 803.
I. C. R. R. v. Illinois, 146 U. S., 453.
Hardin v. Jordan, 140 U. S., 382.
Shively v. Bowlby, 152 U. S., 47.

"The character of the ownership of a riparian proprietor in lands forming the bed of the river is no greater than that of the State."

R. R. v. Platt, 53 O. S., 267.
Stockton v. B. & N. Y. R. R., 32 Fed., 20.

"Nor in the bed itself can the absolute rights of ownership be exercised by the possessor of the title."

Prosser v. N. P. R. R., 152 U. S., 64.
Gould on Waters, Section 140.
Hawkins Point Lighthouse Case, 39 Fed., 77.

"The principle clearly deducible is, that as to navigable rivers, the private right of the riparian owner to the land, ordinarily covered by water, is in all cases subordinate to the paramount right of navigation and its incidents."

Pollock v. The Cleveland Shipbuilding Co., 56 O. S., 666.

Fishing is an incident to navigation and could not be conducted without navigation.

Judge Campbell, in Lincoln v. Davis, 53 Mich., 392, says, "I can see no reason why open water fishing is not as essentially a maritime business as any other use of the water." And the Supreme Court of Ohio held in Bodi, et al. v. The Winous Point Shooting Club, 57 O. S., 233, "That the right of navigation and fishing go together in the lakes and navigable bays of this state, has been held by the court and seems settled." Fishing must be carried on by means of boats and is unquestionably a maritime business. Fishing could not be conducted in waters which are not deep enough to be navigable. (263-293.)

18.

ORDINANCE OF 1787.

The Ordinance of 1787, for the government of the North West Territory, of which the State of Ohio is a part, provided that:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into confederacy, without any tax, impost or duty therefor."

"The Ordinance of 1787 is as obligatory on us as our own Constitution, and even more so, for the Constitution can be amended."

Hogg v. Zanesville Canal and Mfg. Co., 5 Ohio, 410-416.

"This Ordinance applies, not only to the Great Lakes, but to all the streams discharging their waters into the lakes, or into the Mississippi and its tributaries, upon which had been floated, prior to the adoption of the Ordinance, the commercial products of the country. It must be remembered that this commerce then consisted mainly of fish and the skins of wild animals. It was an ordinance saving to the hunter and fisherman the right to navigate the waters, free of charge, and also preserved to him forever the right to fish and hunt upon them." Judge Morse in Sterling v. Jackson, 69 Mich., 530-531.

Houck on Rivers, Sec. 112.

19.

THE STATE OF OHIO HOLDS TITLE TO THE BED OF NAVIGABLE WATERS UPON A PUBLIC TRUST FOR THE PEOPLE OF THE STATE FOR NAVIGATION AND FISHING.

It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over

them, and have the liberty of fishing therein, free from the obstruction or interference of private parties.

Ill. C. R. R. Co. v. People, 146 U. S., 387.
McLennan v. Prentiss, 85, Wis., 427.
Arnold v. Mundy, 6 N. J. L., 1.

"The state holds title to the bed of navigable waters upon a public trust and no alienation or disposition of such property by the State, which does not recognize and is not in execution of this trust, is permissible."

Parker v. People, 111, Ill., 581.
Pollard v. Hagan, 44 U. S., 3 How. 212. (11:565)
Den v. The Jersey Co., 56 U. S., 15 How. 436 (14:757.)
Munford v. Wardwell, 73 U. S., 6 Wall., 423 (18:756.)
Weber v. State Harbor Comrs., 85 U. S., 18 Wall., 57.
McCready v. Virginia, 94 U. S., 391.
Barney v. Keokuk, 94 U. S., 324.
Manchester v. Massachusetts, 139 U. S., 260.
Hardin v. Jordan, 140 U. S., 371.
Smith v. Rochester, 92 U. S., 463.
Illinois Steel Co. v. Bilot, et al., 109 Wis. 418.

It cannot sell to them so as to deprive the public of their enjoyment.

Miller v. Munderhall, 8 L. R. A., 89 S. C., 43 Minn. 95.
Boston v. Richardson, 105 Mass., 351.
Mather v. Chapman, 40 Conn., 382.
Gould on Waters, 382.

The Supreme Court of Ohio say, in the case of Hogg v. Beerman, 41 O. S., 81, "Land covered by the water of a navigable land locked bay or harbor connected with Lake Erie, may be held by private ownership, subject to the public rights of navigation and of fishery, provided the holder derives his title from the express grant made or sanctioned by the United States." This case was followed and approved in The East Harbor Sportsman's Club v. Kelting, et al., 37 W. L. B. 259, 56 O. S., 746, and again in Bodi v. The Winous Point Shooting Club, 57 O. S., 226.

The court further say, in Hogg v. Beerman, 41 O. S., 95, "Where the grantor is the government, the thing granted government property held by absolute title, and no use "of thing granted to which the public is entitled is taken away, etc., (the public rights of navigation and fishing were the uses to which the public were entitled,) and on page 98 the court say, after following and approving the case of Sloan v. Biemiller, 34 O. S., 514, "the right of fishing in Lake Erie and its bays is as open to the public as if they were subject to the ebb and flow of the tide." "No mere grant of the land covered by such waters destroys this public right."

20.

THE FISH IN THE WATERS OF THE BAY ARE HELD BY THE STATE OF OHIO IN TRUST FOR ALL PEOPLE AND PLAINTIFF IN ERROR HAS NO PROPERTY IN THEM.

Fish are animals ferae naturae and plaintiff club has no property in the same until they are subjected to their control.

Parker v. People, 111, Ill., 588.
Magner v. People, 97 Ill., 320.
Lincoln v. Davis, 53 Mich., 375.
Moulton v. Libby, 37 Me., 427.
Packard v. Ryan, 144 Mass., 440.

The ownership of fish is held by the Sovereign authority in trust for all the people of the State.

14 Am. and Eng. Encyc. of Law, 655.
Roth v. State, 51 O. S., 209.

21.

THE SAID WATERS WERE NOT SURVEYED AS SANDUSKY RIVER AND MUD CREEK, BUT AS A PART OF SANDUSKY BAY, AND THE UNITED STATES DID NOT CONVEY THE SAME AS A RIVER AND CREEK AND COULD NOT HAVE SOLD SUCH WATERS SO AS TO EFFECT THE PUBLIC RIGHTS OF NAVIGATION AND FISHING.

Plaintiff's counsel contend that the United States sold the waters in dispute as Sandusky River and Mud Creek and that, therefore, they became the owners of this bay by reason of the sale of the fractional sections surrounding the bay and that such title extended to the middle of the streams.

This contention is wholly unsupported by the evidence in the case and is clearly contrary to law. Plaintiff bases this connection upon the Bourne Survey of 1820.

The court will observe, upon examination of this survey, both in Sandusky and Ottawa Counties, that the surveyor did not mention all the waters in his field notes, but that he has designated them upon his map. Parts of the Sandusky River and Muddy Creek, running through sections 29, 30 31and 32, are there designated as Sandusky River and Muddy Creek.

The Act of 1796 required the surveyor to note in his field

book, the situation of mines, salt licks, salt springs, mill seats, watercourses and the quality of the lands. It will be noticed that the surveyor was not required to note either Mud Creek or Sandusky Bay; but, upon his map of Township No. 6, he prints the names of Muddy Creek, Sandusky River, Green Creek, South Creek, Raccoon Creek, Sandusky Bay and Pickerel Creek, and clearly shows that all of the creeks empty into the bay except Green Creek. He designates Sandusky Bay in very large letters upon his map so that there can be no presumption that he even thought that this great bay was a part of Muddy Creek and the Sandusky River.

The court will observe that upon the Ottawa County map the surveyor commenced at an elm in the south-east corner of section 12 and designated it as "1" upon the map. The court will see that the south-east corner of section 12, which is at least one and one-fourth miles east of Slade's Point, (The point where plaintiff club contends the mouth of the Sandusky River should be.) is upon the shore of Sandusky Bay. The surveyor then proceeded westerly along the shore of Sandusky Bay to "2," an elm. He then proceeded south-westerly along the shore of fractional section 13 to "3," a post in wet prairie. (The distance run so far is upon the shore of Sandusky Bay, according to plaintiff's own contention.) The surveyor then continued the survey around the shore of the bay along the shore of fractional sections 23, 22 and 21. Looking at the Sandusky County Map, the court will observe that Sandusky Bay is also included in the survey the same as that in Ottawa County; the township lying immediately east of the aforesaid township is surveyed precisely the same; part of the land in the township lying on the north side of the bay and part on the south side. There is, therefore, absolutely no evidence that the United States sold the waters in dispute in this case as a river or a creek, but on the contrary, the evidence is conclusive that these waters were meandered as a part of Sandusky Bay. Plaintiff's further contention that the United States granted these lands as such river and creek is wholly unsupported by the evidence. There is not a patent deed in the case. The only deeds are those from plaintiff's immediate grantors which only purport to convey the fractional sections surrounding the bay. The record discloses that much of the land within the sections and fractional sections surrounding the bay was acquired under the State Swamp Land Acts (Rec. 29-30.) And there is nothing in the record to show that any of the lands in said sections or fractional sections were otherwise conveyed, except the erroneous conclusion of the Circuit Court as to lands patented from the government, which is not supported by any evidence.

Each state adopts its own rules as to the ownership of the soil beneath the navigable waters of the state, and by the great weight of authority in the United States, the soil beneath the

navigable waters is not subject to private ownership; and if plaintiff's contention is true, the states which have adopted the rule which does not permit of private ownership of the soil beneath the navigable streams, have all violated their theory.

The only direct adjudication of the public right of fishery in the navigable waters of the state, be they rivers or bays, is that of Sloan v. Biemiller, 34 O. S., 513, wherein the court holds that fishery in the sea and in the waters which are made to flow inland therefrom by its egress and influence, constituting as it does, a great source of sustentation, has in all ages and in all countries been deemed of such importance that it has ever been regarded as a privilege open and common to all persons.

The defendants contend that this decision applies to so much of the rivers of the state as rise and fall with the waters of the lake and bay and the fact in this case is undisputed that the waters of the territory in dispute rise and fall with the waters of Sandusky Bay which rise and fall with the waters of Lake Erie.

The right to fish is mentioned in the case of Gavitt v. Chambers, 3 Ohio, 498, which is the case which first laid down the rule of riparian ownership in Ohio and we submit that in that case the words "right to fish" were mere dictum

The Supreme Court of Ohio say, in the case of June v. Purcell, 36 O. S., 396, in the first paragraph of the syllabus "The principal decided in the case of Gavitt v. Chambers, 3 Ohio, 495, that the owners of land situated on the banks of navigable streams running through the state are also the owners of the beds of rivers to the middle of the stream, as at common law, has become a rule of property, and irrespective of the question of its original correctness, ought not to be disturbed. We contend, therefore, that even though the territory in dispute in this case were a part of a navigable river and creek, which rises and falls with the waters of the lake and bay the public right of fishery would exist irrespective of the ownership of the soil.

Hogg v. Beerman, 41 O. S., 81.
The East Harbor Sportsman's Club v. Kelting, 37 W. L. B., 259. 56 O. S., 746.

22.

CONCLUSION.

There is no question that more concerns the public than an abundant supply of cheap food. It is the basis of the happiness, prosperity and contentment of all people, and the sources of its supply are matters of the highest public concern.

By Section 6968-2, Revised Statutes of Ohio all persons engaged in catching fish for profit in the waters of Lake Erie or in the estuaries or bays thereof in Ohio, are required to pay

a license fee and a tonnage tax to the Fish and Game Commissioners of the State for the purpose of providing for and establishing and maintaining fish hatcheries and necessary expenses incident thereto.

The legislature of Ohio appropriated $43,000.00 for the use of the Fish and Game Commission.

The State has established a fish hatchery at Lakeside in Ottawa County and the United States has established one at Put-in Bay in the same county.

Both of these hatcheries are propogating fish at the public expense and placing them in the waters in question and in Sandusky Bay and Lake Erie.

Are the State of Ohio and the United States propogating fish at the expense of the public and placing them in these waters for the exclusive use and control of this sporting syndicate, that its members may have the exclusive pleasure and profit of capturing them, under a pretended claim of riparian ownership in this great bay?

Are these waters to be replenished year by year at the expense of the public, and the great mass of the people who bear the burden of such expense, and to whom the right of fishing for a livelihood or for pleasure is as important and as dear as is can be to any member of this sporting club, and the fisherman who pay the license fees and tonnage tax, to be perpetually enjoined from catching fish in these waters, and this grat bay, in which commercial fishing has been carried on from the time of the early settlement of the country, be turned over to the sporting club and be converted into a private fishing ground for the exclusive use of plaintiff in error, when it is clear both from the evidence and the law that it does not own it and has not been in possession of it and could not own it under any condition except it be held in trust for all the people of the State for navigation and fishing? We think not. Fishing in these waters is a public trust held by the state of Ohio for all its people and not the subject of monopoly by plaintiff in error.

Respectfully submitted,

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